No. 6536

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE GET NUEY,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco, California,

Appellee.

BRIEF FOR APPELLEE.

GEO. J. HATFIELD,
United States Attorney,

H. A. VAN DER ZEE,
Asst. United States Attorney,

Attorneys for Appellee.

Parker Printing Company, 545 Sansome Street, San Francisco

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BRIEF FOR APPELLEE.

A.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court for the Southern Division of the Northern District of California, denying appellant's petition for a Writ of Habeas Corpus (Tr. 25 and 26).

B.

FACTS OF THE CASE.

The appellant is a male Chinese, aged 29 years, born in China, who was denied admission into the

United States by the Board of Special Inquiry at San Francisco, on the ground that he had not established satisfactorily that he is the son of an American citizen, Lee Share Dew (Tr. 14 to 22). That decision was affirmed on appeal by the Secretary of Labor (Tr. 22 to 25).

C.

ARGUMENT.

1. The decision of the immigration tribunals is neither arbitrary nor capricious.

Appellant's brief, with the exception of a single paragraph, is devoted entirely to matters which were given only incidental weight by the immigration tribunals. The vital conflicts, upon which the excluding decision was primarily based, have been passed over by appellant practically without mention.

Before discussing the material facts of this case, we point out that this is one of a large number of cases on the docket of this court, which involve merely issues of fact already passed upon by the statutory tribunals, reviewed on appeal by the Secretary of Labor and considered and passed upon by the court below, which found no arbitrary or capricious action on the part of the executive tribunals.

The limit of the review in these matters has so often been stated that citation of authorities is

scarcely necessary. This court in the very recent case of

Louie Lung Gooey v. Nagle, 49 F. (2d) 1016,

said:

> "We can not too often repeat that in immigration cases of this character brought before us for review, the question is not whether we, with the same facts before us originally, might have found differently from the Board; rather is it a question of determining simply whether or not the hearing was conducted with due regard to those rights of the applicant that are embraced in the phrase 'due process of law.' (Tang Tung v. Edsel, 223 U. S. 673.) Even if we were firmly convinced that the Board's decision was wrong, if it were shown that they had not acted arbitrarily but had reached their conclusions after a fair consideration of all the facts presented we should have no recourse. The denial of a fair hearing cannot be established by proving that the decision was wrong. (Chin Yow v. United States, 208 U. S. 8.)"

In

Chin Ching v. Nagle, No. 6426 (Decided June 25, 1931),

this court said:

> "Under the provisions of the statute the decision of a Board of Special Inquiry is final unless reversed on appeal to the Secretary of Labor. It is only to be reviewed on habeas corpus when the administrative officers have manifestly abused

the power and discretion conferred upon them. (Tulsidas v. Insular Collector, 262 U. S. 258, 263.) It is not the function of an appellate court in a habeas corpus proceeding to weigh the evidence or to go into the sufficiency of the probative facts. (White v. Young Yen, (C. C. A.) 278 Fed. 619; Low Wah Suey v. Backus, 225 U. S. 460, 468; Zakonaite v. Wolf, 226 U. S. 272, 274; Lewis v. Frick, 233 U. S. 291, 300; Kwock Jan Fat v. White, 253 U. S. 454, 457; Tulsidas v. Insular Collector, supra; Tisi v. Tod, 264 U. S. 131, 133.) This rule has been reiterated by this court in many similar cases, recently in Louie Lung Gooey v. Nagle, No. 6367, decided May 18, 1931. Thus leaving the 'administration of the law where the law intends it should be left; to the attention of officers made alert to attempts at evasion of it and instructed by experience of the fabrications which will be made to accomplish evasion.' (Tulsidas v. Insular Collector, supra.)"

In

Tisi v. Tod, 264 U. S. 131,

the Supreme Court said:

"We do not discuss the evidence; because the correctness of the judgment of the lower court is not to be determined by inquiring whether the conclusion drawn by the Secretary of Labor from the evidence was correct or by deciding whether the evidence was such that, if introduced in a court of law, it would be held legally sufficient to prove the fact found."

We proceed now to consider the evidence, and particularly the vital conflicts in the testimony upon which the executive decision was primarily based.

Testimony was given in appellant's behalf before the Board of Special Inquiry by appellant and by the alleged father. An alleged acquaintance, Lee Lin Sing, also testified. His testimony, however, is based on a single meeting with appellant alleged to have taken place in China in May, 1928. It is without substantial probative force on the issue of the relationship asserted.

> *Weedin v. Lee Gock Doo,* (C. C. A.-9) 41 F. (2d) 129 at 131, (concurring opinion of Judge Dietrich).

Appellant testified that his family consists of:

1. A son born July 15, 1923.

2. Another son born in July or August, 1924, *who died in his home in China in the 12th month of 1924 while his alleged father was in China on his most recent visit.*

3. A daughter born June 12, *1926* (Res. Ex. "A," p. 25).

On August 12, 1924, appellant's alleged father first testified relative to the existence of a son whom this appellant claims to be. He then testified that he had a son named "Lee Gick Nuey", and that the latter at that time *had two sons and one daughter.* (Resp. & C - A

Appellant, according to his own testimony, had no daughter at that time. His daughter was not born until two years later. But let us now consider the testimony given by appellant's alleged father in connection with the present application.

Appellant's alleged father now testifies that appellant never had but two children, a son born in 1923 and a daughter born in 1926 (Resp. Ex. "A", p. 11). Appellant's testimony is that he had a second son born in July or August, 1924, *and that this son died in his home in China, while the alleged father was there on his most recent visit* (Resp. Ex. "A", p. 25). The testimony is that appellant and his alleged father *were then living in the same house in China* (Resp. Ex. "A", p. 26).

The situation therefore is this: In 1924 the alleged father first claimed to have a son, one "Lee Gick Nuey", living in China. He then testified that this alleged son had three children. He now testifies, however, that this appellant in 1924 had only one child. He testifies further that this appellant never had any other child except a daughter who was born in 1926, whereas appellant's testimony is that he had a second son who died in the latter part of 1924 in the house in which the alleged father was then living.

The present testimony of the alleged father, therefore, not only is in flagrant contradiction of the testimony which he gave in 1924, but also flatly contra-

dicts appellant's testimony. If these parties were actually father and son, living in the same house while the former was last in China from September, 1924, to December, 1925, there certainly could be no such disagreement.

Just such conflicts as these have uniformly been held to be sufficient basis for an excluding decision of the immigration tribunals on the ground that the asserted relationship was not satisfactorily made out. Before considering the authorities, however, let us first examine the other conflicts in the case at bar relative to vital matters of relationship and pedigree.

The alleged father testified that his mother was "Ho Shee" (Resp. Ex. "A", p. 12). Appellant testified that his paternal grandmother was "*Hung* Shee", *and that she died in his home in 1919* (Resp. Ex. "A", p. 26). Appellant in 1919 would have been eighteen years of age, and if he were actually a member of this family, certainly there would be no such conflict as to the name of his grandmother.

Furthermore, when in 1924 appellant's alleged father first laid claim to having such a son in China as appellant claims to be, he testified that his son was named "Lee Gick Nuey" (Resp. Ex. "C", p. 15). In 1925 he testified that his oldest son was "Lee Nuey Gat" (Resp. Ex. "C", p. 21). In connection with the present application he testified that appellant is his oldest son and that his name is "Lee Get Nuey" (Resp. Ex. "A", p. 11). Appellant claims the names of "Lee Get Nuey" and "Lee Chung

Din", and testified that he has no other names (Resp. Ex. "A", p. 7).

All the foregoing conflicts relate directly to family matters. Decisions upon similar conflicts are numerous.

In

Weedin v. Yee Wing Soon, (C. C. A.-9) 48 F. (2d) 36, decided Mar. 30, 1931,

there was "complete accord" in the testimony upon a multitude of details, but a discrepancy "difficult if not impossible to reconcile with the alleged relationship". The alleged father testified that his mother died in his home during the previous year. The appellee testified that his grandmother died not in his house but in the house of an alleged brother. It was held that such a discrepancy was inconsistent with the relationship asserted, and that the order discharging the appellee from the custody of the immigration authorities must therefore he reversed.

Likewise, in

Weedin v. Yip Kim Wing, (C. C. A.-9) 41 F. (2d) 665,

the major discrepancies as to family matters were as follows:

1—A discrepancy as to just when the alleged grandparents died.

2—A discrepancy as to whether the alleged grandfather was named Jin *Nay* Hung or Jin *Lee* Hung.

3—A discrepancy as to whether there had been an older brother of the appellee who had died before the birth of the latter.

This court said:

> "In view of these discrepancies in the testimony relied upon by the applicant, we cannot say that the applicant was denied a fair hearing on the question of his right to enter the United States."

In

Weedin v. Jew Shuck Kwong, (C. C. A.-9) 33 F. (2d) 287,

the conflicts related mainly to whether or not certain relatives had lived in the appellee's home in years past and as to how many sons the alleged father had. Circuit Judge Rudkin said:

> "The discrepancies to which we have referred, and other minor ones, *did not relate to unimportant objects or incidents outside of the family and home which may not be observed at all or are soon forgotten. They related to facts connected with the immediate home life of the family, which were necessarily within the personal knowledge of the several witnesses, if the claim of relationship in fact existed.* For this reason we are of opinion that the testimony in support of the claim of relationship was so far discredited that the department was justified in finding that such claim was not satisfactorily established."

In each of those three cases the lower court had upheld the petitioner's right to be discharged. Never-

theless, because of those discrepancies, it was held in each case that the order discharging the appellee must be reversed.

In

Tse Yook Kee v. Weedin, (C. C. A.-9) 35 F. (2d) 959,

discussing the single discrepancy as to whether the appellant's alleged grandmother had bound feet or natural feet, Circuit Judge Dietrich said:

> "She lived in the little village of only five or six houses where the applicant claims to have been born and reared, *and of her all should have had exact knowledge.*"

In

Quan Jue v. Nagle, (C. C. A.-9) 35 F. (2d) 505,

there were conflicts as to whether appellant's alleged grandmother had natural feet or unbound feet, as to the times of death of the alleged grandparents and as to whether at one time two adopted sons of an alleged uncle had lived in the family home in China. Circuit Judge Dietrich said:

> "We are unable to say that the Immigration officers acted arbitrarily, capriciously or unreasonably in declining to believe applicant and his two brothers."

In

Tom Him v. Nagle, (C. C. A.-9) 27 F. (2d) 885,

Circuit Judge Rudkin said:

> "It will thus be seen that there were discrepancies in the testimony *relating to matters of family history, which would not exist if the claim of relationship was well founded.*"

Clearly the several conflicts in the testimony offered in this appellant's behalf relative to how many children he had in 1924; relative to whether he had a second son who died in 1924 in the house in China in which it is claimed both appellant and his alleged father were then living; relative to the name of appellant's grandmother, who is said to have died in his home when he was 18 years old; and relative to the name of the alleged son of Lee Share Dew, who this appellant claims to be, are fully as vital as those considered in the cases which we have cited above.

In the recent case of

Wong Sun Ying v. Weedin, (C. C. A.-9) 6415 (decided June 8, 1931),

this court said:

> "If the subject is psychologically important and if it concerns the intimate family life, then a discrepancy with reference to it is inconsistent with the alleged relationship. This is the essence

of the test used by this court in the case of *Weedin vs. Yee Wing Soon,* 48 F. (2d) 37."

In

Wong Foo Gwong v. Carr, (C. C. A.-9) 50 F. (2d) 360 (decided June 1, 1931),

this court said:

"The immigration officials must necessarily base their decisions upon conflicts or agreements that arise in the testimony of applicants for admission and that of their witnesses. * * * With the burden of proof of the relationship on the applicant, as it is here, when the texture of the testimony that is usually relied upon as the basis of comparison is hopelessly shot with holes there is certainly no 'abuse of discretion' and no arbitrariness if the application is refused."

Regarding the fact that each time the alleged father testified before the immigration authorities relative to the existence of an alleged son who this appellant claims to be, viz.: in 1924, in 1925 and in 1930, he gave a different name as that of said son. The following authorities are pertinent:

In

Soo Hoo Yen ex rel. Soo Hoo Do Yin v. Tillinghast, (C. C. A.-1) 24 F. (2d) 165,

the court held:

"The question remains whether there was such a conflict of evidence that different conclusions

might be reached as to the relationship of the applicant to the alleged father; for, if there was, the conclusion of the Department of Labor is final.

Briefly stated, the evidence given by the alleged father was that in 1911 he had only one son, Soo Hoo Do Tung; that in 1913 he had two sons, Soo Hoo Do Tung and Soo Hoo Do Young; that in 1916 he changed the name of Soo Hoo Do Tung to Soo Hoo Do Yim; and that prior to 1916 the name by which the applicant was known and called was Soo Hoo Do Tung.

The evidence of the applicant as to this was that he never had a brother by the name of Soo Hoo Do Tung or Do Teung, and that he was never known or called by either name.

In this state of the evidence, we think different conclusions could be drawn as to the claimed relationship."

In

Chin Share Nging v. Nagle, (C. C. A.-9) 27 F. (2d) 848,

the court considered as a major discrepancy the fact that the name given for the appellant differed from the name which the alleged father had in 1914 stated as the name of his son.

The only comment made in appellant's brief relative to any of these various conflicts as to family matters is the suggestion that when on August 12, 1924 the alleged father testified that his oldest son

had two sons and one daughter, he was testifying from hearsay, as he had not himself been in China for a number of years. Appellant's brief makes no mention whatsoever of the various other contradictions which we have discussed above, and even as to the alleged father's testimony in 1924 that his oldest son then had two sons and one daughter, the alleged father when confronted with that testimony in connection with the present application, offered no such explanation as is suggested in the brief (Resp. Ex. "A" p. 11).

In each of the cases cited in appellant's brief the discrepancies related solely to collateral matters of a trivial nature which might not be observed at all, or, if observed, might easily be forgotten. In none of those cases were there conflicts in the testimony relative to family matters such as are presented in the case at bar. This case is also distinguishable from those for another reason, viz.: here there is no "overwhelming weight of evidence" consisting of testimony and declarations of numerous alleged relatives over a period of many years.

Louie Lung Gooey v. Nagle, supra.

In view of the vital conflicts which we have discussed above, we deem it wholly unnecessary to take up the time of the court with a detailed consideration of the minor points which were merely mentioned incidentally by the immigration tribunals in arriving at their decision.

We submit that no arbitrary or capricious action on the part of the immigration tribunals has been shown, and that the decision of the court below should be affirmed.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

H. A. VAN DER ZEE,
Assistant United States Attorney,
Attorneys for Appellee.